No. 14,983

United States Court of Appeals
for the Ninth Circuit

THEODORE B. RUSSELL,

Appellant,

vs.

THE TEXAS COMPANY, a corporation,

FREDERICK T. MANNING DRILLING COMPANY, a corporation, and

THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

Appellees.

THE TEXAS COMPANY, a corporation,

Appellant,

vs.

THEODORE B. RUSSELL,

Appellee.

Brief of Appellee Railway Company

Appeal from the United States District Court for the District of Montana

Of Counsel:

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1870

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The appellee Railway Company will confine this separate brief to the issue involving the ownership of the mineral fee. The issue involving damages awarded and denied will be covered in a separate brief by appellee and cross-appellant, The Texas Company. A more careful analysis of the factual background will assist both court and counsel. Record references designate T for the original Transcript, ST for the Supplemental Transcript, and Ex. for exhibits.

STATEMENT OF FACTS

July 2, 1864, is the effective date of the Northern Pacific land grant act *(C. 217, 13 Stat. 365)*. Section 3 provided that at the time the line of railroad became definitely fixed, and a plat thereof was filed in the general land office, and the United States at that time had full, unencumbered title, then:

> "That there be, and *hereby is* granted to the 'Northern Pacific Railroad Company', its successors and assigns * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States * * *."

By the foregoing, Congress defined for the Territories the "place lands" or "place limits", located in a strip 40 miles wide on either side of the completed line of road. Realizing that the United States might not have full, unencumbered title to these place lands, and that there might be a deficiency, Congress defined a second strip 10 miles wide, known as "lieu lands" or "first indemnity strip", located between 40 and 50 miles from, and on

either side of, the completed line of road. Preceding the designation of the first indemnity strip, Section 3 provides:

> "and whenever, prior to said time (that is, prior to the time the line of road was definitely fixed and plat filed), any of said sections shall have been * * * otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior * * *."

Provisions of Section 6 are of particular pertinence here. Section 6 first required a government survey for 40 miles in width on either side of the entire line of road, the width of the "place strip" in territories. It then provided:

> " * * * *the odd sections of land hereby granted shall not be liable* to sale, or entry, or preemption *before or after they are surveyed, except by said company,* as provided by this act; but the provisions of the (preemption and settlement laws) shall be, and the same are hereby, extended *to all other lands* on the line of said road, when surveyed, *excepting those hereby granted to said company.* * * *" (Emphasis supplied.)

On May 31, 1870, a Joint Resolution of Congress became effective *(Res. 67, 16 Stat. 378).* We shall discuss the resolution and its legislative history later in this brief. It authorized the railroad company to locate and construct a new main line to some point on Puget Sound via the Columbia river valley, with its branch line from some convenient point on its main trunk line, across the Cascade Mountains, to Puget Sound:

> "under the provisions and with the privileges, grants, and duties provided for in its act of incorporation".

In other words, we must read into the Joint Resolution the sections of the act of 1864, including the two of particular importance here, Sections 3 and 6. The Joint Resolution accordingly provided with respect to the new main line between the Columbia river valley and Puget Sound:

Section 3:

> "That there be, and *hereby is* granted to the 'Northern Pacific Railroad Company', its successors and assigns * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States * * *.
>
> " * * *
>
> "and whenever, prior to said time (that is, prior to the time the line of road was definitely fixed and plat filed), any of said sections shall have been * * * otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior * * *.

Section 6 (after requiring a survey 40 miles in width):

> " * * * *the odd sections of land hereby granted shall not be liable* to sale, or entry, or preemption *before or after they are surveyed, except by said company,* as provided by this act; but the provisions of the (preemption and settlement laws) shall be, and the same are hereby, extended *to all other lands* on the line of said road, when surveyed, *excepting those hereby granted to said company.* * * *" (Emphasis supplied.)

The Joint Resolution then contained the language upon which the appellant relies in this case:

> " * * * Provided, that all lands *hereby granted*

> to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; * * *."

The joint resolution also created a second indemnity strip between 50 and 60 miles on either side of the entire line of road with one limitation. A replacement selection could be made in the second indemnity strip only within the same state or territory for which there was a deficiency in the basic grant for that state or territory. A selection in the second indemnity strip in Montana required a deficiency in the "place lands" in Montana.

The foregoing constitute the basic statutory provisions upon which appellant claims rights in Montana lands under the settlement and preemption proviso of the Joint Resolution of 1870.

On February 21, 1872, map of the proposed railroad route through the territory of Montana was filed in the federal land office. On April 22, 1872, the Commissioner transmitted an order received by the Register and Receiver on May 6, 1872, directing the withholding from sale, settlement, preemption, or other disposition of all surveyed and unsurveyed odd numbered sections within 40 miles on either side of said railroad. Construction of the railroad was then completed. On June 25, 1881, map showing the definite, fixed and completed location was filed in the federal land office. Section 23, the land involved, has been at all times, and now is, an alternate

odd-numbered section located less than 40 miles from the general route proposed, and from the definite, fixed, and completed line of road, *(ST, Pp. 3-5, No. 1, 2, 3)*.

The land within 40 miles on either side of the completed road was surveyed, and plat of survey was filed August 21, 1900. Section 23 involved was included *(ST, Pp. 5, No. 4)*. Accordingly, Section 23 at all times was, and is, within the "place limits".

On September 22, 1900, the railway company filed with the federal land office its "List No. 36 (Place)" which included Section 23 involved. On September 30, 1900, the federal land office issued its certificate that the lands were not mineral in character, were not otherwise disposed of, and were within 40 miles of the rail road *(ST, Pp. 5-8, No. 5)*.

June 23, 1902, patent issued to defendant railway company, recorded in Dawson County on July 14, 1902 (Ex.).

On November 30, 1909, there was a contract for deed (Ex.) from the railway company as grantor to MaBelle Cobb, recorded in Dawson County on June 2, 1917, containing this exception and reservation:

> " * * * excepting and reserving unto the grantor, its successors and assigns, forever, all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the grantor, its successors and assigns, shall pay to the grantee, or to his heirs or assigns, the market value at the time mining operations are commenced of such portion of the

surface as may be used for such operations, including any improvements thereon; * * *"

On June 14, 1918, the railway company executed and delivered a deed to Millard Stubrud, assignee of MaBelle Cobb, containing the same exception and reservation. The deed was recorded in Dawson County on June 26, 1918 (T, Pp. 59; also Ex.).

The following instruments are on file as exhibits—Sheriff's deed on foreclosure of July 11, 1923, recorded in Dawson County on the same date, issued to Petters and Company; special warranty deed of May 27, 1926, from Petters and Company to Frederick M. Blossom; and special warranty deed of May 27, 1926, from Petters and Company to Frederick M. Blossom; and special warranty deed dated and recorded in Dawson County, Montana, on July 14, 1944, from Frederick M. Blossom and his wife to appellant Russell containing this special warranty:

> "Parties of the first part do hereby expressly warrant that they have made no former grants or conveyances of said property, and further warrant, promise and agree that they will defend the said property unto the party of the second part, his heirs, executors and assigns against every and all persons lawfully claiming the same under, by or through the said parties of the first par, *but against none other.*" (Italics supplied.)

Each year since March 1, 1919, Dawson County has levied and assessed, and the railway company has paid, a tax on the railway company's reserved right of entry upon Section 23 *(ST, Pp. 8, No. 6).*

Complaint herein was filed December 8, 1952, re-

questing a decree declaring the mineral exception and reservation of the railway company void, invalid, and a cloud on plaintiff's title, and for additional relief against the Texas Company not covered in this brief *(T, Pp. 3-16)*.

On February 19, 1953, appellee railway company filed herein its answer *(T. Pp. 37-52)* denying the invalidity of the mineral exception and reservation of the railway company; claiming that defendant railway company owns the mineral fee and the right of entry; and alleging affirmative defenses of failure to state a claim for relief *(T. Pp. 47, Second Defense)*, laches *(T, Pp. 47, Third Defense)*, estoppel by deed *(T, Pp. 50, Fourth Defense)*, and bar of limitation *(T, Pp. 51, Fifth Defense)*.

On July 16, 1953, appellee railway company filed herein a separate motion for summary judgment *(T, Pp. 54)* which was granted by the court on November 23, *1953 (T, Pp. 66-69)*, upon which judgment entered *(T, Pp. 69, 126)*.

STATEMENT OF THE CASE

All facts pertaining to the ownership of the mineral fee have been fully developed and are undisputed.

Only those lands in Montana within the "place limits" for which the United States had full and unencumbered title as of the date the line of railroad became definitely fixed, and plat thereof was filed with the general land office, were embraced within the language "hereby granted" in Sections 3 and 6 of the Act of 1864. After July 2, 1864, the United States had no power to sell the

"place lands" to anyone other than the company. Those "place lands" were "hereby granted" as of the date of the act of July 2, 1864, whether they were surveyed or not.

Section 23 involved in this case has been at all times within the "place limits" in Montana both before and after survey. The United States had unencumbered title to Section 23 as of the date the line of the railroad became definitely fixed, and the plat was filed in the general land office. Title to Section 23 vested in the railway company in praesenti as of July 2, 1864. The issue of patent by the United States to the railway company in 1902 confirms the vesting of title by reason of fulfillment of the terms and conditions of the grant of 1864.

No indemnity lands were included within the language "hereby granted". "Indemnity lands" were those "other lands" at all times open to settlement and preemption as specified in Section 6 of the Act of 1864. The railroad company acquired no title in "indemnity lands" until first, the grant of "place lands"; second, a deficiency in the "place lands"; third, a survey; fourth, an act of selection by the railroad company; fifth, clear title in the United States as of the date of selection; and sixth, approval by the Secretary of Interior and issue of a patent to the railroad company. Between July 2, 1864, and the date of selection, the United States had power to dispose of indemnity lands. They were not "hereby granted".

The Joint Resolution of 1870 authorized a new main

line between Portland and Puget Sound not contemplated by the Act of 1864, and made a new and additional grant of lands between Portland and Puget Sound under the same provisions, and with the privileges, grants and duties provided in the act of 1864. The language "hereby granted" contemplated the "place lands" only between Portland and Puget Sound. The legislative history reflects that Congress intended the settlement and preemption proviso to apply only to those lands "hereby granted" by the resolution; that is, the "place lands" between Portland and Puget Sound. No indemnity lands were included within that language "hereby granted". No lands in Montana, whether place lands or indemnity lands, were or are subject to the settlement and preemption proviso upon which appellant relies.

Furthermore, the patent issued in 1902 by the United States to the railway company conveyed both surface fee and mineral fee. It is conclusive evidence of the title vested in the railway company as against all those whose rights did not commence before its issue. The title of the predecessor's in interest of this appellant depends upon, and stems from, the deed given by the railroad company in 1918 to Stubrud, and which contained a specific, express exception and reservation of minerals. Appellant had only a special warranty deed in 1944 from Blossoms that they would defend title against all persons claiming under Blossoms, but against none other. Appellant is estopped from questioning the mineral reservation.

Finally, appellant is barred by limitations and by laches.

ARGUMENT

I. *THE SETTLEMENT AND PREEMPTION PROVISO APPLIES ONLY TO THE PLACE LANDS BETWEEN PORTLAND AND PUGET SOUND.*

A. *Analysis Of Land Grant Acts.*

1. *Act of July 2, 1864 (C. 217, 13 Stat. 365).*

The authorities hold that the "place lands" only were embraced within the terminology "hereby granted". Title to all those granted lands, those "place lands" not otherwise disposed of, or settled upon or preempted, or mineral in character, when the line became definitely fixed, vested immediately in the company in praesenti as of July 2, 1864.

It was contemplated by Congress that there would be many sections of land within the "place limits" which, prior to the time the line of road became definitely fixed, would be mineral in character, or settled upon or preempted. No right, title or interest in such sections ever passed to the company and they were sections or lands lost to the grant.

Having in mind those sections which might be lost to the grant as of the date the line of road became definitely fixed, and to compensate for the deficiency, Congress in the Act of July 2, 1864, created a "first indemnity strip" 10 miles wide located between 40 and 50 miles from the definitely fixed line of road in territories,

and 20 to 30 miles in states. For each section of land in the "place strip" lost to the grant, the company could select a replacement section, or indemnity section, in that first indemnity strip. If that replacement section was not at the date of selection settled upon or preempted, or mineral in character, the Secretary of Interior could approve the selection, and issue patent to the company. Selection could be made only after the government survey was completed.

It is easy to see why the Department of Interior in its decisions, and the Supreme Court of the United States in its decisions, have held repeatedly that lands in the indemnity strip were not lands "hereby granted". Only those "place lands", title to which vested in the company in praesenti as of July 2, 1864, were lands "hereby granted" by the act.

Section 6, after first requiring a survey for 40 miles in width on both sides of the road, provided:

> "and the odd sections of land *"hereby granted* shall not be liable to sale, or entry, or preemption *before or after they are surveyed,* except by said company as provided in this act; but the provisions of the (preemption and homestead acts) shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, *excepting those hereby granted* to said company * * *."

Whenever the government had clean title on the date the line of road became definitely fixed, and plat thereof was filed, title to the "place sections" vested immediately in the company in praesenti as of July 2, 1864, under the term "be, and hereby is, granted" in Sec. 3 of the Act

of 1864. The government could not reserve them, take them back, or sell or dispose of them to anyone else, from July 2, 1864, they belonged to the company. Subsequent issue of patent simply confirmed the title. Those were the sections contemplated by the language "hereby granted" in the Act of July 2, 1864.

The words "hereby granted" did not contemplate any land in the indemnity strips. Title to the indemnity lands as well as right of control, remained in the government at all times after July 2, 1864, subject to sale, settlement or preemption, until completion of a government survey; a deficiency in the "place limits"; an act of selection by the company; unencumbered title in the United States as of the date of selection; approval of the selection by the Secretary of Interior, and issue of patent to the company. Title to all indemnity lands remained in the government, or passed from the government to qualified settlers or preemptors, at all times between July 2, 1864, and the date of approval of the selection by the Secretary of the Interior. As of the date of July 2, 1864, the company might never obtain title to any lands in the indemnity strips. Accordingly, they were not "hereby granted".

2. *Joint Resolution of May 31, 1870 (Res. 67, 16 Stat. 378).*

The joint resolution of May 31, 1870, authorized a new main line between Portland and Puget Sound, and made a new, second, additional grant of land between Portland and Puget Sound that had never been granted before, and which was not contemplated by the Act of

July 2, 1864. It was on exactly the same terms and conditions as the act of 1864. The new line was authorized between Portland and Puget Sound:

> "under the provisions and with the privileges, grants, and duties provided for in its act of incorporation * * *" *(Joint Resolution 67, 16 Stat. 378).*

That is, it granted in praesenti as of May 31, 1870, "place lands" between Portland and Puget Sound not otherwise disposed of when the line of road became definitely fixed between those two points and plat thereof was filed in the land office. After May 31, 1870, the United States had no power to sell or dispose of those "place lands". Those "place lands" between Portland and Puget Sound were the only lands embraced within the terminology "hereby granted" as used in the joint resolution.

That Resolution also created the "first indemnity" strip between Portland and Puget Sound, and a "second indemnity strip" along the entire line. Selections in the "second indemnity" strip could be made only in the same state or territory in which there was a deficiency in the "place lands" of that state or territory.

As to lands in the first or second indemnity limits, acquisition of title by the company depended upon the following factors—first, the grant of "place lands"; second, a deficiency in the amount or number of sections granted in the "place limits"; third, a government survey; fourth, an act of selection by the company; fifth, clear title in the United States as of the date of selection;

and sixth, approval of the selection by the Secretary of Interior and issue of patent.

Title to all lands in the first and second indemnity strips, between Portland and Puget Sound, and in the second indemnity strip along the entire line, remained in the government, and were subject to settlement or preemption, at all times between May 31, 1870, and the date of the occurrence of the sixth factor or event listed above, approval by the Secretary of Interior of a selection by the company. As of May 31, 1870, the company might never acquire any right, title, or interest in the lands in the first indemnity strip between Portland and Puget Sound, or in the second indemnity strip in any state or territory. They were not lands "hereby granted."

It is clear from the legislative history of the Joint Resolution, from the terminology of the resolution itself, from the decisions of the Department of the Interior and the United States Supreme Court, that the resolution made a new grant of lands between Portland and Puget Sound that did not exist before; that the only lands "hereby granted" by the resolution were the place lands between Portland and Puget Sound; and that the language "hereby granted" in the settlement and preemption proviso did not contemplate lands in the first or second indemnity limits in any state or territory.

a. *The Joint Resolution Made a New Grant Between Portland and Puget Sound.*

The act of 1864 granted no lands and no rights of construction between Portland and Puget Sound. Under

that original grant, Portland was connected with the east by the branch line down the Columbia River.

Railroad Grant, Feb. 17, 1892,
14 L. Dec. 187;

N. P. v. McRae, Sept. 30, 1887,
6 L. Dec. 400;

N. P. R. R. Co., March 21, 1894,
18 L. Dec. 255.

The Supreme Court of the United States in the case of *United States v. N. P. R. Co., March 5, 1894, 14 S. Ct. 598, 152 U.S. 284, 38, L. Ed. 443,* said:

"The first and principal question is whether the act of July 2, 1864, contained a grant of lands in aid of the construction by the Northern Pacific Railroad Company of a railroad and telegraphic line from Portland to Puget sound.

"* * * It is clear that the purpose of Congress, by the act of 1864, was not to connect Portland with Puget Sound by a road established upon the most direct or eligible route between those places, but, so far as Portland and its vicinity were concerned, to connect them with the east by a branch road, through the valley of the Columbia river, that would strike the main trunk line connecting Puget sound and Lake Superior. There was no purpose, by that act, to make a grant of lands for a road to be located and constructed from a point 'at or near Portland' to Puget sound.

* * *

"Coming next to the joint resolution of May 31, 1870, which was accepted and acted upon by the company, we find, in connection with authority to issue bonds in aid of the construction and equipment of its road, to be secured by mortgage, that express authority was given, for the first time, to the Northern Pacific Railroad Company 'to locate and con-

struct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound.' * * * We cannot agree that this resolution is to be held, in this respect, as simply a recognition by congress of an existing right in the company to locate and construct a road from Portland to Puget Sound, with the right to obtain lands, in aid thereof, as provided in the act of 1864. On the contrary, *it should be regarded as giving a subsidy of lands in aid of the construction of a new road, not before contemplated, that would directly connect Portland and its vicinity with Puget sound.*

"This view is supported by the action of the interior department in the case of Railroad Co. v. McRae, 6 Dec. Dep. Int. 400."

The same Court said in *N. P. R. Co. v. DeLacey, May 22, 1899, 19 S. Ct. 791, 174 U.S. 622, 43 L. Ed. IIII: 11:*

"The grant of lands to aid the construction of that portion of the main line of the railroad of the plaintiff in error between Portland and Puget Sound dates from the joint resolution of May 31, 1870, and prior to that time there was no land grant in aid of the construction of that portion of the road. * * *

"The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. *It was not an amendment to the third section of the act of 1864 which granted the lands.*"

In the case of *United States v. Northern Pacific Rail-*

way Company, 1904, 24 S. Ct. 330, 193 U.S. 1, 48 L. Ed. 593, involving lands in an overlap between the two granting acts, the Supreme Court stated:

> "By the act of Congress of July 2, 1864 (13 Stat. at L. 365, chap. 217), a grant was made to the Northern Pacific Railroad Company in aid of the construction of a railway from Lake Superior to some point on Puget sound, * * *.
>
> "On May 31, 1870, Congress passed a joint resolution *making an additional grant* to the same company for the location and construction of 'its main road to some point on Puget sound via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound.' 16 Stat. at L. 378.
>
> *"The line east of Portland provided for in the act of 1864* formed nearly a right angle at Portland *with the line from there to Puget sound provided for in the joint resolution, and thus the two grants overlapped* and the lands in suit fell within the overlap.
>
> "But the line down the Columbia from Wallula to Portland was never built, and the grant was forfeited September 29, 1890 (26 Stat. at L. 496, chap. 1040, U. S. Comp. Stat. 1901, p. 1598), while the line from Portland to Puget Sound and east across the Cascade mountains was built and the *grants* earned." *(Italics supplied, 24 S. Ct. at 331).*

Kimes v. Northern Pacific Railway Company, 1914, 49 Mont. 573, 144 Pac. 156, involved a claim in Montana by an alleged bona fide settler against the defendant railway company and its successors in interest. The Montana Supreme Court, relying on the Nelson case, apparently felt the land in Montana was granted by the Act of 1864, because although the statutory source of the title was

discussed, there was no reference whatsoever to the Joint Resolution of 1870.

3. *Legislative History of Joint Resolution.*

The Land Decisions of the Department of the Interior, as well as the decisions of the Supreme Court, relied in part on the legislative history of the Joint Resolution in support of their conclusion that the settlement and preemption proviso of the resolution applied only to the lands granted by the resolution between Portland and Puget Sound. They described the legislative history as convincing.

N. P. v. McRae, 6 L. Dec. 400;
U. S. v. N. P., 14 S. Ct. at 603;
U. S. v. N. P. 61 S. Ct. at 287.

Senate supporters of the resolution pointed out repeatedly that the only new land granted was between Portland and Puget Sound. The opponents insisted upon a settlement and preemption proviso, and repeated amendments were offered to apply the proviso to all lands "heretofore" granted, as well as to all lands "hereby granted" by the resolution. They were all defeated. The supporters made it clear time and again that the settlement and preemption proviso should apply only to the lands "hereby granted" between Portland and Puget Sound. The joint resolution that finally passed the Senate was with that congressional intent and understanding. Action by the Senate in 1870 is found on the following pages of the Congressional Globe: Feb. 8, Pp. 1097; Feb. 22; Feb. 28, Pp. 1584-1586; Mar. 2, Pp. 1624-1627; Apr.

7, Pp. 2480-2486; Apr. 7, Pp. 2491-2495; Apr. 9, Pp. 2539-2547; Apr. 11, Pp. 2569-2584; Apr. 20, Pp. 2833-2848; Apr. 21, Pp. 2867-2869.

Proceedings before the House occurred on May 5 *(Pp. 3263-3271, Cong. Globe);* May 10 *(Pp. 3343-3348, Cong. Globe);* May 11 *(Pp. 3365-3368, Cong. Globe);* May 25 *(Pp. 3786-3798, Cong. Globe);* and May 26 *(Pp. 3850-3853, Cong. Globe)* on which date the joint resolution passed the House.

We shall not quote all of the legislative history. The following brief excerpts will illustrate that when the House considered the Resolution, the House understood clearly that the Senate had intended the settlement and preemption proviso to apply only to the new grant between Portland and Puget Sound, and that the Senate had defeated all amendments and attempts to apply the proviso to the lands granted by the act of 1864. Similar amendments were attempted in the House and were all defeated.

Mr. Hawley and Mr. Sargent offered amendments that all lands granted to the company be subject to the settlement and preemption proviso *(Pp. 3367, Cong. Globe, May 11, 1870; Pp. 3788, Cong. Globe, May 25, 1870)*. Mr. Sargent then said:

> "Mr. SARGENT. The joint resolution as it passed the Senate and as now pending, provides that if after five years the lands granted by this bill are not sold they shall be subject to settlement and preemption like other lands, at not exceeding $2.50 an acre. I wish to extend that provision to all lands granted by any law to this company; * * *."

(Pp. 3788, Cong. Globe, May 25 ,1870.)

Other amendments were likewise offered to impose the proviso on all lands, those granted by the resolution, and those by the act of 1864.

"Mr. WHEELER. I do not object to votes being taken on the amendments which have been offered.

"The SPEAKER. Amendments have been offered by the gentleman from Illinois, (Mr. Hawley,) and the gentleman from California, (Mr. Sargent.) Other gentlemen have indicated their desire to offer amendments, if they were allowed to do so. The gentleman from Pennsylvania (Mr. Cessna) objected, as he had the right to do, to any more amendments being offered than were in order. The Chair will take the direction of the gentleman having charge of the joint resolution.

"Mr. WHEELER. We have no objection to the amendments being submitted.

"The SPEAKER. These amendments, then, will be considered as pending, and the previous question will be considered as operating upon them.

"Mr. CESSNA. I reserve my objection to the second amendment of the gentleman from California, (Mr. Sargent.) The reason of my objection is that the gentleman from Ohio (Mr. Welker) has substantially offered the same amendment.

"Mr. SARGENT. My amendment is offered as a substitute.

"The SPEAKER. If there be unanimous consent, all of the amendments offered will be considered as pending excepting the amendment offered by the gentleman from California, which has been indicated.

"Mr. SARGENT. It is not the same as the amendment of the gentleman from Ohio, (Mr.

Welker,) and I ask that the amendment of the gentleman from Ohio (Mr. Welker) may be read to show that it is not the same.

"The Clerk read as follows:

" 'Add to the first section as follows:

" '*Provided further,* That as to all new grants herein of additional lands, such lands shall be sold by said company to actual settlers at a price not exceeding $2.50 per acre, and in quantities not exceeding one hundred and sixty acres to any one person.'

"Mr. SARGENT. This simply refers to new lands granted by this joint resolution, while mine refers to all lands which have been granted heretofore, which may be granted under this proposition.

"The SPEAKER. The first amendment in order is the amendment of the gentleman from Illinois, (Mr. Hawley,) which covers all the lands, and as the question first recurs on that amendment, it will be read.

"The Clerk read as follows:

" 'Add to first section as follows:

" '*And provided further,* That the privileges herein granted are upon the following conditions, namely: all the lands herein or heretofore granted to said railroad company shall be sold to actual settlers only, and in quantities not greater than one hundred and sixty acres to any one person, and for a price not exceeding $2.50 per acre; *And provided further,* That no mortgage that may be given by said railroad company shall operate to prevent the sale to actual settlers only upon the terms and conditions herein provided, of all the lands herein or heretofore granted by the United States to said railroad company; and any violation of this condition shall work for a forfeiture of all the lands herein or heretofore granted by the United States to said railroad company.

"Mr. SARGENT. I rise to a point of order. Mine was the second amendment offered, and it is in order under the rules, and no single objection can stop it.

"The SPEAKER. The gentleman from California is correct, and the gentleman from Pennsylvania will be unable, by his objection, to cut off the gentleman from California from having his amendment considered." *(Pp. 3792, Cong. Globe, May 25, 1870.)*

* * *

"The SPEAKER. The question is first on the amendment offered by the gentleman from Illinois, (Mr. Hawley,) which is first in order, and which will now be reported by the Clerk.

"The Clerk read as follows:

"'Add to first section as follows:

"'*And provided further,* That the privileges herein granted are upon the following conditions, namely: All the lands herein or heretofore granted to said railroad company shall be sold to actual settlers only, and in quantities not greater than one hundred and sixty acres to any one person, and for a price not exceeding $2.50 per acre; *And provided further,* That no mortgage that may be given by said railroad company shall operate to prevent the sale to actual settlers only, upon the terms and conditions herein provided, of all the lands herein or heretofore granted by the United States to said railroad company, and any violation of this condition shall work a forfeiture of all the lands herein or heretofore granted by the United States to said railroad company.'

"Mr. FARNSWORTH. We may as well have the yeas and nays on the amendment.

"The yeas and nays were ordered.

"The question was taken; and it was decided in

the negative—yeas 78, nays 106, not voting 45; as follows:

" * * *

"So the amendment was not agreed to." *(Pp. 3797, Cong. Globe, May 25, 1870.)*

* * *

"The SPEAKER. The next question is on the amendment offered by the gentleman from California, (Mr. Sargent,) which the Clerk will read.

"The Clerk read as follows:

" 'Strike out all after the word "points," in line thirty-nine, page 3, down to and including the word "bidder," in line fifty-five, page 3, and insert:

" '*Provided,* That all lands granted to said company shall be subject to settlement and preemption like other lands at a price to be paid to said company not exceeding $2.50 per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisons thereof, to the highest and best bidder; and the purchasers at said sale, except actual settlers on not greater subdivisions than one hundred and sixty acres, shall acquire no higher interest in said lands than is by this act granted to said company; and as to all lands purchased under any such sale by any corporation or by any other persons greater in quantity than one quarter section for any one person, all such lands shall be and remain subject to the right of purchase by actual settlers at a price not exceeding $2.50 per acre, and in amounts not exceeding one quarter section, by any one person, under such rules and regulations as the Secretary

of the Interior may prescribe to carry this provision into effect.'

"Mr. SARGENT. I demand the yeas and nays on agreeing to the amendment.

"The yeas and nays were ordered.

"The question was taken; and it was decided in the negative—yeas 73, nays 104, not voting 52; as follows:

" * * *

"So the amendment moved by Mr. Sargent was not agreed to." *(Pp. 3798, Cong. Globe, May 25, 1870.)*

Numerous other amendments were then voted down and finally, on May 26, 1870, the Joint Resolution passed the house.

"The main question was ordered, which was upon the passage of the joint resolution.

"Mr. HOLMAN called for the yeas and nays.

"The yeas and nays were ordered.

"The question was taken; and it was decided in the affirmative—yeas 107, nays 85, not voting 37; as follows:

" * * *

"So the joint resolution was passed." *(Pp. 3853, Cong. Globe, May 26, 1870.)*

We have necessarily, of course, omitted the great bulk of the discussions and debates in Congress. The foregoing are a portion only.

A careful review and analysis of the legislative history reflects the intention of both houses of Congress that the settlement and preemption proviso upon which appellant relies was intended to apply only to the "place

lands" in the new grant between Portland and Puget Sound, and was never intended to apply to either the "place lands" or the "indemnity lands" in Montana.

4. *The Decided Cases Carry Out The Intent of Congress and Hold That Lands "Hereby Granted" Are "Place Lands" Only, And Not "Indemnity Lands."*

The opinions and decisions of the federal land department have repeatedly noted the distinction between "place lands" and "indemnity lands". Title to "place lands" vested in praesenti as of the date of the legislation. They were lands "hereby granted". The company might never acquire title to the indemnity lands. They were at all times open to settlement and preemption until selected by the company as indemnity lands, followed by issue of patent by the Secretary of Interior. See the following decisions of the land department:

Priest v. N. P. R. Co., May 23, 1884, 2 L. Dec. 506;

Opinion, May 17, 1883, 2 L. Dec. 511;

N. P. R. Co. v. Miller, Aug. 2, 1888, 7 L. Dec. 100;

N. P. v. Davis, July 25, 1894, 19 L. Dec. 87, reviewing and reaffirming N. P. v. Miller.

The Supreme Court of the United States has followed the same reasoning.

Buttz v. N. P., Nov. 15, 1886, 7 S. Ct. 100, 119 U.S. 55, 30 L. Ed. 330, says:

" * * * When the general route of the road is thus fixed in good faith, and information thereof

given to the land department by filing the map thereof with the commissioner of the general land-office, or the secretary of the interior, *the law withdraws from sale or pre-emption the odd sections,* to the extent of 40 miles on each side. * * *

"Nor is there anything inconsistent with this view of the sixth section, as to the general route, in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable."

Hewitt v. Schultz, 21 S. Ct. 309, 45 L. Ed. 463, 180 U.S. 139, was decided by the Supreme Court of the United States on January 7, 1901. Hewitt, homestead patentee, filed suit in ejectment against Schultz, a purchaser from the N. P. R. Co. which asserted ownership by reason of the land grant act. The land involved was within the first indemnity strip in the Territory of North Dakota. The opinion relates the history with reference to the definite location of the road. A map designating the general route was filed March 30, 1872. On April 22, 1872, the Secretary of Interior ordered a withdrawal of all lands in the place limits shown on the map of general route. On June 11, 1873, map of definite location was filed. On June 24, 1873, the land department ordered a withdrawal of all lands in the first indemnity strip. The

land in dispute was located in that first indemnity strip. On April 10, 1882, Hewitt settled on the lands and thereafter qualified for a patent unless he was barred from doing so by the earlier withdrawal order of June 24, 1873. No selection had been made by the company before April 10, 1882. In fact it was not until March 19, 1883, that the company filed its "selection list" embracing the land involved. The Department of the Interior relying on *N. P. v. Miller, 7 L. Dec. 100,* and *N. P. v. Davis, 19 L. Dec. 87,* referred to above, held that the lands in the indemnity limits did not fall within the place or granted limits, were not included in the term "hereby granted" as used in Sec. 6 of the act of July 2, 1864, and were open to settlement under the public land laws until a selection had been made by the company. Patent was issued to Hewitt. The ejectment action followed. The Supreme Court of the United States posed the problem with this significant language:

> " * * * Was it competent for the Secretary of the Interior, immediately upon the acceptance of the map of definite location, to include in his withdrawal from sale or entry lands within the indemnity limits? Was he invested with any such authority by the act of July 2d, 1864 (13 Stat. at L. 365, chap. 217)? Did Congress intend, by that act, to declare that when the railroad company indicated its line of definite location the odd-numbered sections outside of the 40-mile limit and within the 50-mile limit, on each side of such line, along the whole of the line thus located, should not be subject to the preemption and homestead laws until it was finally ascertained whether the railroad company was entitled, *by reason of the loss of lands within the place*

or granted limits, to go into the indemnity limits in order to obtain lands to meet such loss? An answer to these questions may be found in the act of July 2d, 1864, as interpreted by the Land Department for many years past. We will now advert to such of the provisions of that act as are pertinent to the present inquiry.

"By the 3d section of the act Congress granted to the Northern Pacific Railroad Company (quoting 3rd section)."

The court then quoted section 3 of the act of July 2, 1864, and thereafter said in connection with that question:

"This section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress *'granted* to the Northern Pacific Railroad Company *only* public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights *at the time its line of road was definitely fixed,* and a plat thereof filed in the office of the Commissioner of the General Land Office,'—lands that were not at that time, free from pre-emption or other claims or rights being excluded from the grant. (Citing many cases.) The cases all speak of the granted lands as those within the place limits."

The court next quoted section 4 of the act of July 2, 1864, following which it said with respect to Section 6:

"But so far as the present case is concerned the most material section of the act is the 6th. That section provided: (Quoting Section 6).

"It is contended that, construing the 3d and 6th sections together, it is clear that the words, 'the odd sections of land hereby granted,' in the first part, and the word 'excepting those hereby granted to said company,' in the latter part, of the 6th section, refer to the lands described in the 1st section of the act,—that is, to the odd-numbered sections in the place

limits which were free from pre-emption or other claims or rights, and had not been appropriated by the United States prior to the definite location of the road; that as to 'all other lands on the line of the said road, when surveyed,' the act expressly declares that the provisions of the pre-emption act of 1841 and the acts amendatory thereof, and of the homestead act of 1862, should extend to them; that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road, which were unappropriated when the line of the railroad was definitely fixed; and that if, at the time such line was 'definitely fixed,' it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted, or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the 40-mile and within the 50-mile line, and, under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits. It is also contended that the object of the reference in the 6th section of the Northern Pacific act to the pre-emption and homestead acts could only have been to bring the odd-numbered sections in the indemnity limits within the operation of those acts.

"This construction of the act of July 2d, 1864, finds support in legislation enacted subsequently and before the railroad company filed its map of general route. By a joint resolution approved May 31st, 1870, Congress declared (quoting from the Joint Resolution).

"Thus, it seems, a second indemnity limit was established into which the company could go and obtain lands in lieu of lands lost to it in the granted or place limits."

The court next discussed prior opinions of the Land Department including *Atlantic & P. R. Co., Aug. 13,*

1887, 6 L. Dec. 84, and quoted from *N. P. R. Co. v. Miller, 7 L. Dec. 100,* cited above. The court then held:

"It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done, it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress; for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

"But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas, and Smith, and upon which the Land Department has acted since 1888. 'It is the settled doctrine of this court,' as was said in United States v. Alabama G.S.R. Co. 142 U.S. 615, 621, 35 L. Ed. 1134, 1136, 12 Sup. Ct. Rep. 308, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number

> of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.' These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2d, 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being out of the way, there is no legal ground to question the title of the plaintiff to the land in dispute."

It is noted that there was a dissent in the case of *Hewitt v. Schultz.* For that reason the subsequent opinion of the court in *Southern Pacific Railroad Company v. Bell, January 13, 1902, 22 S. Ct. 232, 183 U.S. 679, 46 L. Ed. 386,* is important. That case involved the Southern Pacific land grant, an Act on July 27, 1866, a land grant identical with that of the Northern Pacific. Because of the importance of the issue involved, the court reviewed the *Hewitt v. Schultz* case, reviewed the entire background of the issue, and specifically and expressly affirmed the decision. In the Southern Pacific case, the land was within the indemnity limit in a state rather than a territory. The court said in part:

> "Treating this case as a reargument of the question involved in Hewitt v. Schultz, and it practically comes to that, we still adhere to the principle there announced. It seems to us the more reasonable, if not the necessary, inference to be deduced from the language of Sections 3 and 6. By the former there is *'hereby granted* . . . every alternate section of public

land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state.' These words terminate the grant, the remainder of the clause being immaterial in this connection, and if the whole clause had been followed by a period, instead of a semicolon, the meaning, perhaps, would have been clearer. But there follows another clause, that 'whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be *selected* by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections,' etc. There is here a clear distinction between the lands granted *in praesenti* by the company, whenever the deficiency in the granted lands shall be ascertained.

"The 6th section carries out the same idea. It requires a survey of 40 miles in width on both sides of the entire line, whether passing through states or territories. This would include only the granted or place limits within a territory, but within a state would cover the indemnity limits as well. There was no order in the act to withdraw any lands from settlement or sale, but such withdrawal seems to have been made in pursuance of the practice of the Interior Department, and for the purpose of preventing lands granted to the railroad company from being taken up by settlers, before the completion of the line and the final issue of patents. As was said by Mr. Secretary Lamar in the Atlantic & P. R. Co. 6 Land Dec. 84: 'Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no

special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken.' But as the power to withdraw extends only to the *'lands hereby granted'* and all other lands, except those hereby granted, remain open to settlement, we are thrown back upon Sec. 3 to determine what are the lands 'hereby granted'.

* * *

"We are therefore of opinion that the act of July 27, 1866, did not authorize the withdrawal by the Secretary of the Interior of the indemnity lands, that such lands remained open to homestead and pre-emption entry, and that patents issued to settlers within such indemnity limits, based upon the entries made prior to the selection by the railroad company, approved by the Interior Department, were valid as conveyances of the land as against the selection by the railroad company."

In *Oregon & C. R. Co. v. United States, April 6, 1903, 23 S. Ct. 615, 189 U.S. 110, 47 L. Ed. 730,* the court said:

"Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits,—which interest relates back to the date of the granting act,—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make. (Citing and quoting cases.) Having regard to the

adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction, or with the approval, of the Secretary."

In view of the foregoing decisions, it is manifestly clear that the language "hereby granted" in the settlement and pre-emption proviso of the resolution applied only to the "place lands" in the new and additional grant between Portland and Puget Sound. It did not apply to indemnity lands in either the first or second indemnity strip regardless of where they were located. In particular, it did not apply to any lands in Montana.

5. Land Grant Case of 1940; *U. S. v. N. P. Ry. Co. 61 S. Ct. 264, 311 U.S. 317, 85 L. Ed. 210.*

The foregoing legislative history, decisions of the Supreme Court of the United States, and Land Decisions of the Department of Interior, alone warrant a judgment on the merits in favor of the respondent. The decision of the Supreme Court in 1940 in the Land Grant Case concludes all discussion on the issue. We have saved the discussion of the case under a separate heading only because it is an extremely complex, complicated and difficult opinion to read, analyze and understand. It takes a thorough grounding in the legislative and judicial history of the land grant to understand it. At least such was our experience.

The line of road became definitely located in Montana on June 25, 1881, long after the enactment of the

Joint Resolution of 1870. Long after that the government of the United States created vast Forest Reserves which included lands in the first and second indemnity strips which had been selected by the company, and to which patents had issued. Prior to the time of patent, however, the Department of Interior had issued an order withdrawing the lands from settlement, pre-emption or selection, but the Secretary had overlooked the withdrawal order and had issued the patents. The government filed suit to cancel the patents. *(Forest Reserve Case, 41 S. Ct. 439, 256 U.S. 51, 65 L. Ed. 825).* As a result of the decision in that case, legislation was enacted to bring about a final settlement of all rights of the company arising out of the land grant acts. The last legislation was June 25, *1929 (46 Stat. 41).* By the terms of that Act all lands within the indemnity limits of the railroad which on June 5, 1924, were embraced within the exterior boundaries of any National Forest or other Government reservation and which, in the event of a deficiency in the land grant, were available to the Railway Company, by indemnity selection, or otherwise, in satisfaction of such deficiency were to be taken out of the operation of the land grants and retained by the United States as part of the Government reservations wherein they are situate, free of all claims, if any, which the Railroad Company or its successor, the Railway Company might have to acquire the same. Providing, however, that for such lands the Company should be entitled to receive compensation from the United States to the extent, and in the amounts, if any, the Courts

should hold compensation might be due. It declared forfeited all unsatisfied indemnity selection rights claimed by the Railroad Company, or the Railway Company, or any person claiming under either of them, together with all claims to additional lands under the grants by Congress to the Railroad Company. It expressly declared that the right reserved to the United States to amend the Act of 1864, and the Joint Resolution of 1870, should not be considered as fully exercised or waived in any way by the Act, and its passage should not be construed as evidencing the purpose or intention of Congress to depart from the policy of the United States as expressed in the Resolution of May 31, 1870, relative to the disposition of granted lands; and the right was expressly reserved to the United States at any time to enact further legislation relating thereto. It declared that the provisions of the Act should not be construed as affecting the present title of the Railroad Company, or its successors, the Railway Company, or any subsidiary of either or both, to its right of way, or to lands actually used in good faith in the operation of the road. The Attorney General was directed to institute such suit or suits as in his judgment might be required to remove the cloud cast upon the title to the lands belonging to the United States as the result of the claim of the Companies; to procure a judicial determination of all controversies and disputes respecting the operation and effect of the grants, and action previously had under them, and that a full accounting between the United States and the Companies be had of the land grant. It

further directed that in such proceedings there should be submitted to the Court for determination to what extent the terms and conditions in the granting Act had been performed by the United States, and by the Railroad Company, or its successors, including the legal effect of the foreclosure of any or all mortgages claimed to have been placed on the lands by virtue of the Resolution of May 31, 1870, and the extent to which such foreclosure proceedings met the requirements of that Resolution respecting disposition of the granted lands.

It was further directed that by said judicial proceedings it should be determined what lands, if any, had been erroneously patented or certified to the Railroad or Railway Company as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of the grants. And, further, that the United States and the Railroad or Railway Company, or any other person should be entitled to have heard and determined all questions and claims germane to a full and complete adjudication of their respective rights under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, and all questions of law and fact presented to the joint Congressional committee appointed under authority of the Resolution of Congress of June 5, 1924, notwithstanding that such matters might not be specifically mentioned.

It will be seen from the foregoing abbreviation that in the contemplated litigation directed, it was intended every question from the organiation of the company to

the date of the Act that had been, or that now might be, raised, should be presented to the Court and finally determined; and that upon such determination should be based an adjustment of the grant.

Pursuant to the command of the statute, the suit known as the Land Grant case was commenced by the United States government. The United States Supreme Court rendered its opinion in *United States v. N. P. Ry. Co., 1940, 61 S. Ct. 264, 311 U.S. 317, 84 L. Ed. 210.* (For subsequent action, see *41 F. Supp. 273.)*

a. *Issues Presented In Land Grant Case.*

We have examined the pleadings and briefs of both the government and the company that were presented in the Land Grant case. The issue was squarely presented whether or not the settlement and preemption proviso of the joint resolution applied only to the lands granted by the resolution between Portland and Puget Sound, or whether it also applied to lands elsewhere. Paragraph XIII had alleged that the five year period referred to in the proviso terminated on July 4, 1884; that on that date there were millions of acres along the entire line of road between Wisconsin and the Pacific Coast that should have been open to settlement and preemption; that the company failed to open the lands to settlement and preemption; that such was a breach of the contract contained in the Act of July 2, 1864, as modified and supplemented by the Joint Resolution; and that the government was entitled to an accounting.

b. *Analysis of Land Grant Opinion.*

As indicated, we had difficulty in following, understanding, and appreciating the scope of the opinion. Many, many issues were involved. Because of our own difficulty, we offer here a detailed, step by step, analysis of that portion of the case pertinent to the single issue involved here of the scope of the settlement and preemption proviso of the resolution of 1870. The Supreme Court commences its opinion with a summary of the act of July 2, 1864; the financial difficulties in construction; and the act of 1869 authorizing the extension of the branch line from Portland to Puget Sound which the company did not accept; and then said with respect to the Joint Resolution of May 31, 1870:

> "May 31, 1870, Congress again authorized the company to issue bonds to aid in the construction and equipment of its road, to be secured by mortgage on all of its property, railroad, land grant, and franchise to be a corporation. It further authorized the location and construction of the main railroad via the valley of the Columbia River to Puget Sound and of a branch from the main line across the Cascade Mountains to Puget Sound, *and made a grant of land in connection with the construction authorized between Portland and Puget Sound, on the same terms as the original grant. It also provided* a second indemnity belt extending ten miles beyond the first on either side of the right of way." (Emphasis supplied.) *(61 S. Ct. at 269.)*

Note the significant choice of words that the resolution made *a grant* of land between Portland and Puget Sound on the same terms as the original grant. Note also the statement thereafter — "It also provided a second indemnity belt", thereby not including the second indem-

nity belt within the description of lands *granted* by the resolution.

The court then continued its discussion of the legislative background and history followed by this significant description of the two acts:

> "The grant of 1864 was of the ten nearest alternate odd-numbered sections of public land, not mineral, on each side of every mile of the line as definitely located, in a state, and of twenty such sections in a territory. This grant was in praesenti. The lands thus granted are spoken of as 'place lands'. They were in two belts each twenty miles wide in states, and forty in territories, parallel to the right of way.
>
> "Excepted from the grant were lands reserved, granted, appropriated, preempted, or subject to other claims and rights at the date of definite location. These exempted lands are spoken of as 'lands lost to the grant'. In lieu of such lost lands the Act provided that other lands were to be selected by the company, under the direction of the Secretary of the Interior, from odd-numbered sections not more than ten miles beyond the place lands, on each side of the road. The two ten-mile strips thus defined are spoken of as 'the first indemnity belts' or 'the first indemnity limits'.
>
> "The Resolution of May 31, 1870, *granted, as respects the additional line authorized between Portland and Puget Sound, place and indemnity lands, as granted for the original line by the Act of 1864. It also authorized* what are spoken of as 'second indemnity' belts ten miles wide, on either side of the original indemnity limits, in any state or territory in which the company could not obtain the number of sections intended for it by its charter. This additional grant, however, was conditioned that lieu lands in the second indemnity limits might be chosen only in the same state or territory in which place

lands were lost to the grant." (Emphasis supplied.) *(61 S. Ct. 269-270.)*

The court then continued its discussion of the history leading to the Act of June 25, 1929 *(46 Stat. 41),* and the particular litigation involved.

Commencing at page 272 of 61 S. Ct. reporter, and continuing to the top of page 276 the court discussed six claims of the government of alleged breaches and the action taken by the master thereon, upon which the court was equally divided. We are not concerned with five of those six points. We are with No. 4 involving the dismissal by the master of paragraph XIII which referred to the settlement and preemption proviso. The court said:

> "The court, after sustaining certain of the plaintiff's exceptions and dismissing almost all of the defendants', found the company entitled to patents for certain lands outside the reserves and to compensation for the loss of 1,453,061 acres of land within them. The court reserved for future decision the contentions of the mortgagees that they are purchasers for value whose rights cannot be affected by the Government's claim and also ascertainment of the amount to be awarded to the company.
>
> "At this stage of the litigation Congress adopted the Act of May 22, 1936, authorizing a direct appeal from the decree of the District Court to this court. Pursuant to that statute the present appeals by the United States and the company were taken. As to many of the issues the parties have accepted the decision of the District Court. Errors are, however, assigned to the decree below by both the Government and the company.
>
> "The Government concedes that the Act of 1929, supra, is not a declaration of forfeiture for breach of conditions imposed by the Act of 1864 and the

Resolution of 1870, but a reference to the courts of all questions as to performance and breach of the contracts created by the Act and the Resolution, to the end that the respective rights and liabilities of the parties may be determined and enforced. The company asserts that the Act of 1929 is an exercise of the power of eminent domain whereby the company is deprived of further right to select indemnity lands, and is to be paid just compensation for the right so taken. But the company does not deny that, in ascertaining the amount due it, the Government may offset the amount of any claims it may now be entitled to assert by reason of the company's breaches of contract.

"The Government urges that the breaches of covenant by the company have been so substantial that it cannot call for further performance by the United States and is, therefore, not entitled to further selection rights or to any money compensation for their abrogation. Reliance is placed upon the following alleged breaches. * * *

"4. The claim that the company failed to perform its contract by refusing to open lands granted it by the Resolution of 1870 to settlement and preemption at $2.50 per acre.

"Section 10 of the Act of 1864 provides that 'no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States.'

"An additional line was authorized by the Joint Resolution of 1870 and a land grant made therefor. The Resolution empowered the company to issue bonds in aid of construction and equipment, and to 'secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation.' The Resolution further provided 'that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the

mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre.'

"Paragraph XIII of the Bill refers to these provisions of the Joint Resolution and alleges that among the place lands granted there are many million acres the quantity and description of which are known only to the company, or its predecessor, which should have been opened to settlement and preemption whereas they were, subsequent to July 4, 1884, (five years from the date finally fixed for completion of the road), sold at such prices, and on such conditions, as to the company seemed best, and that this was a breach of the company's contract with the United States and defeated the policy of the United States. The master reached the conclusion that the motion to dismiss paragraph XIII should be sustained and the court so ruled.

"The Government insists that the Resolution required the company to hold the lands open for settlement, at the price and in parcels as specified, after five years, whether mortgaged or not; that it failed to do so, and sold the lands at higher prices and in larger parcels than the Resolution required, and that its breach of covenant defeats its right to any award. The company contends that the intent of the Resolution was to permit it to mortgage all its property rights; that if, at the expiration of five years from the completion of the road, any of the granted lands were undisposed of, or were not subject to mortgage, those lands were open to preemption; that, whether or not the existence of a mortgage prevented settlement of the lands, after five years, there was no duty on the company to dispose of them to settlers; and that the company has not broken any covenant in respect of the lands in question.

* * *

"The Government asserts that none of the paragraphs referred to above should have been dismissed. It says that each of the breaches charged was so substantial as to disentitle the company to further performance by the United States. But, in any event, it says that all of them, taken together, certainly require this conclusion. The company, on the other hand, contends that, as to some of the matters charged, the allegations of the bill do not show any breach, and that, as to others, if a breach is sufficiently alleged it was not such as, in the light of the history of the grants and the performance received by the United States, would disentitle the company to all further performance.

"If the Government's position is sound the decree below should be reversed and the cause remanded with instructions to enter a judgment against the company and in favor of the United States.

"The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view of the fact that our rulings on other issues may be dispositive of the entire controversy." *(61 S. Ct. 272-276.)*

The court then continued its discussion with reference to numerous other claims of the government upon which a majority of the court arrived at a decision. The court said:

"The Government puts forward certain further claims which, if sustained, would preclude any recovery by the company." *(61 S. Ct. at 276.)*

We are not concerned in this case with claims numbered 7 through 17. We are concerned with No. 18 *(61 S. Ct. at 287)*. The court said:

"18. The company's failure to open lands granted by the Resolution of 1870 to settlement and preemption.

"The company's alleged breach in this aspect as a defense to the company's entire claim is mentioned in heading 4, supra.

"The bill alleges, in paragraph XIII, the company's failure to open the granted lands to settlement and preemption was a breach of its contract and 'in defeat of the policy of the United States with respect to the disposition of its public domain, * * *.' In paragraph XLII the court is asked to determine the extent to which the company has failed to comply with the obligation imposed by the Joint Resolution pertaining to the disposition of the lands by settlement and preemption and to decree that the company now perform its covenant to the extent this is possible and, where it is found impossible for the company to perform, the plaintiff have such relief as the court may deem proper; and further that the court decree that any and all moneys received by the company from or by reason of the granted lands after the breach of its covenant be declared to have been received by the company in trust for the use and benefit of the United States and that the plaintiff be awarded judgment for the amount of such moneys. The prayer is, therefore, in the alternative for damages or for an accounting, as upon a constructive trust.

"*We hold,* contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. *We hold further* that the company was not a trustee of the lands for the United States either in its own right or in behalf of possible settlers. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands.

"*A majority of the justices who heard this case are of the opinion* that the proviso of the Resolution of 1870 required the company to open the lands

granted by the Resolution to preemption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to mortgage or not; that its failure so to do was a breach of its contract with the United States and that the Government is entitled, if it can, to prove any damage to it, or advantage to the company, which resulted from this breach of contract. In this view the court below should not have dismissed paragraph XIII of the bill and that paragraph should be reinstated for the purpose of permitting the Government to prove damages and proof should be submitted thereunder to that end." *(61 S. Ct. 287-288).*

Some of the discussion of the court with reference to No. 20, the company's claim to indemnity resulting from the Tacoma overlap is also pertinent *(61 S. Ct. at 289).*

"For an understanding of the contention certain facts must be borne in mind. By the Act of 1864 the line authorized was to run from a point on Lake Superior to some point on Puget Sound, with a branch via the Columbia River to a point at or near Portland. By the Joint Resolution of 1870 the company was authorized to construct its main line to a point on Puget Sound via the valley of the Columbia River with the right to construct its branch from a point on its main line, across the Cascade Mountains to Puget Sound. Thus the resolution altered what had been the proposed main line across the Cascade Mountains into a branch line, and the former branch line to Portland into a section of the main line running down the Columbia River to Portland and thence turning north to Puget Sound. Although by an act of 1869 the company had been authorized to construct a line between Portland and Tacoma, and a right of way had been granted therefor, no grant of lands in aid of such construc tion was made until the adoption of the Resolution of 1870. That resolution in authorizing the location and construction of this portion of the company's

road, did so in these words: 'Under the provisions and with the privileges, grants, and duties provided for in its act of incorporation'. *Obviously the land grant was the same as that in the charter act, namely, place lands in a strip extending* twenty miles on each side of the road in states and forty miles on each side in territories, with an indemnity belt ten miles in width on either side of the exterior limits *of the place grant.*

"The legislative history of the resolution shows that Congress was informed the company could not obtain, in connection with its original grant, all that Congress intended it should have, for the reason that, prior to selection of indemnity lands for losses in place lands, much territory had been removed from the operation of the Act by preemption and settlement under the land laws. In order to compensate the company for such losses there was inserted in the Joint Resolution the following: (quoting the provisions for the second indemnity strip.)

"The Resolution made a new grant in aid of the Portland-Tacoma line. The portion of the Cascade branch (designated as main line in the Act of 1864) entering Tacoma from the east was definitely located in 1884. *This location defined the place lands granted by the Act of 1864.* The line authorized by the Joint Resolution entering Tacoma from the south was definitely located in 1874, *thus earning the grant made by the Resolution.*

" * * * And it is settled that such a grant as that under consideration is a grant not of lands by quantity but of lands in place or by description. Whether Congress intended, *in connection with its later grant of 1870,* to accord the company indemnity for failure to receive, in aid of the Portland-Tacoma line, lands to which it would get title in virtue of its definite location of the Cascade line, is the question. We conclude that Congress did not so intend." *(61 S. Ct. 289-291;)* (Emphasis Supplied).

We note that in the Land Grant case of 1940 the Court

in its footnotes cited in support of the rules of law there involved its early decision of *Hewitt v. Schultz,* discussed at pages 27-32 of this brief. The Court said on note 17:

> "After the company had filed its maps of definite location the Secretary mapped the indemnity limits specified by the Act of 1864 and withdrew the lands comprehended within those limits from sale or entry. In 1888 the then Secretary held that land within the indemnity limits was open to preemption under the homestead laws and that such preemption, even before the actual survey of the lands, deprived the company of the right to select the lands preempted. This view was adopted by this court in 1901. 17
>
> 17. Hewitt v. Schultz, 180 U.S. 139, 21 S. Ct. 309, 45 L. Ed. 463."
>
> *(61 S. Ct. at 274-275.)*

Again with respect to footnote 20, the court cited *Hewitt v. Schultz* in support of the following:

> "Much was said in argument as to the meaning of the phrase 'lands available as indemnity' as used in that case. It seems clear that unsurveyed lands are not available to the company under the Act of 1864. It will be observed that the company must select indemnity lands under the direction of the Secretary of the Interior. That officer has invariably ruled that no selection can be made or approved until the lands in question are surveyed.
>
> "This ruling was necessitated by the very terms of the Act of 1864, which requires selection of alternate sections designated by odd numbers. Obviously, until surveyed, no odd-numbered sections could exist. Unsurveyed lands are not public lands. 22
>
> "22. Hewitt v. Schultz, 180 U.S. 139, 152, 21 S. Ct. 309, 314, 45 L .Ed. 463; * * *"
>
> *(61 S. Ct. at 276-277,)*

It is clear, accordingly, that the Supreme Court of

the United States had no intention in the Land Grant case of 1940, of reversing either the long line of decisions of the land department, or *Hewitt v. Schultz (Pages 27-32 of this brief,* or *S. P. v. Bell (Pages 32-34 of this brief),* which is what this Court will have to do to find for appellant.

Subsequent court proceedings are found in *41 F. Supp. 273.*

6. *Summary.*

The act of July 2, 1864, granted every alternate, odd numbered section in the Territory of Montana located within a strip forty miles wide on either side of the definitely fixed line of road providing they were not mineral in character, and were not settled upon or pre-empted on that date. Those lands are commonly known as the "place lands." Title to such lands vested in the railroad company in praesenti as of July 2, 1864. Those lands and those lands alone were embraced within the language "hereby granted" appearing in that act.

The Joint Resolution of May 31, 1870, made a new and additional grant of lands between Portland and Puget Sound on the same terms as the original charter. It granted every alternate odd numbered section located within a strip 40 miles wide in the Territory of Washington, and 20 miles wide in the State of Oregon, between Portland and Puget Sound, on either side of the definitely fixed line of road, providing they were not mineral in character, and were not settled upon or preempted before that date. Those lands are likewise commonly called

"place lands". Title to those lands vested in the company in praesenti as of May 31, 1870. Those lands and those lands alone were embraced within the language "hereby granted" appearing in the settlement and preemption proviso of that resolution.

No title to any lands in Montana, indemnity or otherwise, was acquired by the company under the Joint Resolution. Title to all lands in Montana was grounded in the act of July 2, 1864.

In any event, we can paraphrase the settlement and preemption proviso of the Joint Resolution relied upon by appellant and it will read:

> "Provided that all 'place lands' between Portland and Puget Sound * * * shall be subject to settlement and preemption like other lands * * *."

Appellee is entitled to a judgment on the merits.

B. *Answer To Argument Of Appellant In His Brief.*

We agree that a summary judgment should only be granted where there is no genuine, material issue of fact. *(App. Br., Pp. 17-19).* In this case all facts pertaining to the ownership of the mineral fee are fully developed and undisputed.

1. *Nature And Effective Date of the Original Grant of July 2, 1864. (App. Br., Pp. 21-23)*

Appellant quotes an excerpt out of context from the case of *St. Paul & Pac. R. Co. v. N. P., 1891, 11 S. Ct. 139 U.S. 1, 35 L. Ed. 77.* The full decision reflects that the court held that the language in Section 3 'that there be, and hereby is granted', indicated that the property itself passed and not any special or limited interest in it;

that there was a transfer of a present title as of the date of the grant; that the patents issued were confirmation and assurance of the fulfillment of the grant as of the date of the grant.

See also: *Nelson v. N. P., 1903, 23 S. Ct. 302 188 U.S. 108, 47 L. Ed. 406;*

N. P. v. Townsend, 1903, 23 S. Ct. 671, 190 U.S. 267, 47 L. Ed. 1044;

U. S. v. N. P., 1904, 24 S. Ct. 330, 193 U.S. 1, 48 L. Ed. 593;

U. S. v. N. P., 1920, 41 S. Ct. 439, 256 U.S. 51, 65 L. Ed. 825;

U. S. v. N. P., 1940, 61 S. Ct. 270, 311 U.S. 317, 85 L. Ed. 210; see later action in 41 F. Supp 273.

2. *The Joint Resolution of 1870 Constituted A Grant of New Title To The "Place Lands" In Montana. (App. Br., Pp. 23-27)*

We will not repeat the argument above which fully covers the situation. The *Land Grant Case (U.S. v. N.P., 1940, 61 S. Ct. 264, 311 U.S. 317, 85 L. Ed. 210)* does not hold as inferred by appellant. It holds that the settlement and preemption proviso applies to the "lands granted by the Resolution"; that is, to the "place lands" between Portland and Puget Sound.

Appellant argues that the railway company and land department by the form of Place List recognized the application of the proviso to "place lands" in Montana.

The sole purpose of the Place List was to identify those lands to which defendant railway company claimed title, and for which it desired patent, to obtain the land

office certificate, and ultimately to obtain the patent. No consideration whatsoever of the settlement and preemption proviso, or its applicability, or its non-applicability, was involved. There was no reference whatsoever to the settlement and preemption proviso. Appellant admits the certification of facts by the land office on the "place list"—that is, that section 23 was within the "place limits", was surveyed land, and wholly unclaimed by any other persons. The suggested inference is not reasonable and is not warranted.

In determining the title which passed, and when it passed, we are governed by the statutes and the facts that do or do not bring the land within the statutes. Under the undisputed facts, title to Section 23 under the Supreme Court decisions vested in the defendant railway company in praesenti by the Act of 1864. Furthermore, under the Supreme Court decisions, the settlement and preemption proviso of 1870 did not apply to such lands.

3. *By Virtue Of The Proviso Of The Joint Resolution Of 1870, The Purported Mineral Reservation Of The Northern Pacific Railway Company Is Void (App. Br., Pp. 27-33).*

   a. *The Proviso Conferred No Rights On Appellant Or His Predecessor In Title and Interest, and Could Not Invalidate The Exception and Reservation of Minerals in Appellee Railway Company's Conveyance To Stubrud.*

The language of the proviso is this:

"*Provided,* that all lands *hereby granted* to said

company, which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like all other lands, at a price to be paid to said company, not exceeding two dollars and fifty cents per acre."

Appellant's predecessor in title and interest contracted to purchase, and thereafter obtained, a deed to all of said Section 23, Township 17 North, Range 53 East, M.P.M., Dawson County, Montana, subject to an express exception and reservation of the minerals. Obviously he could not have acquired this section of land by "settlement and pre-emption like all other lands", because the homestead laws limited settlers to one quarter section of unappropriated public lands, and provided that "no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law." *(R.S. Sec. 2289; March 3, 1891, c. 561, Sec. 5, 26 Stat. 1097, 43 U.S.C.A. Sec. 161).* It is difficult to understand, therefore, how appellant, or his predecessor, can possibly maintain the position that anything in the proviso of the Joint Resolution entitled him to purchase the entire section, including the minerals, and rendered void the exception and reservation of the minerals by the Railway Company. If the sale itself was not violative of the proviso (assuming, for the sake of argument, that the land in question was subject to the proviso), how could the ex-

ception and reservation of the minerals violate the proviso?

The proviso, obviously, is not self-executing, and it does not purport to confer rights on anyone but the United States. The lands subject to the proviso were granted to the Railroad Company in fee, but subject five years after completion of the entire road "to settlement and pre-emption like all other lands." Since other lands subject to settlement and preemption were only unappropriated public lands, the proviso was nothing more than a reservation by the United States of a power of disposition under the preemption and homestead laws, with an implied covenant on the part of the Railroad Company to permit such disposition. While a refusal to open lands subject to the proviso to preemption and settlement at the expiration of the five-year period, would constitute a breach of the Company's contract with the United States, only the United States could complain thereof. This was so decided in *Oregon & Cal. R. R. v. United States, 238 U.S. 393, at pages 431-436, 35 S. Ct. 908, 59 L. Ed. 1360,* in respect of a much more specific proviso "That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents per acre."

Nothing contained in the proviso of the Joint Resolution of May 31, 1870, purports to prevent the Railroad Company from selling lands for such price and upon such terms as may be agreed, to persons not possessing

the qualifications of a preemptor, or who might not wish to preempt or occupy them, or might desire to purchase more land than could be acquired by settlement and pre-emption. In *Union Pacific R. Co. v. McShane, 24 Fed. Cas. p. 640* (Case No. 14,382), the Circuit Court for the District of Nebraska construed a substantially identical proviso in Section 3 of the Act of July 1, 1862, granting lands to the Union Pacific Railroad Company, as follows:

> "I am inclined to consider the true meaning and effect of the provision in question to be this: While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or pre-emption; after three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain—the price not exceeding $1.25 per acre, being payable to the company instead of the government.
>
> "This view harmonizes and gives effect to all the different provisions of the act. The right of the company to the lands granted is a substantial one. The title passes to the company. Patents are required to be issued to the company conveying the 'right and title to the lands'. During the three years the right of the company to sell at its own price is clear, and has not been denied. After the three years the title does not change. The company still owns the lands, but 'subject' to the right of any person possessing the qualifications of a pre-emptor, to settle upon them and obtain them as a pre-emptor may obtain other public lands. But this right does not prevent the company from selling lands in good faith to

persons who may not wish to pre-empt or occupy them. The rights intended to be given to the public are secured and the evils apprehended from the company having a monopoly of such a vast amount of lands, are avoided by this construction—which recognizes the right of the actual settler to pre-empt the lands, and thus destroy the monopoly, and also the right of the company actually and in good faith, to sell any tract not at the time pre-empted, and which, if sold, likewise destroys to that extent the monopoly, since a sale of lands is usually the first step towards their settlement and cultivation."

The question in the case was whether the reserved rights of the United States under the proviso rendered the lands exempt from State Taxation. The court held the lands subject to the proviso not exempt, and was affirmed by the Supreme Court in *Railway Company v. McShane, 22 Wall. 444, 22 L. Ed. 747.* That court said:

"The road was completed and accepted by the President in May, 1869, and these lands have been subject to such pre-emption since three years from that date, if this right can be exercised by the settler without further legislation by Congress, or action by the Interior Department. We do not now propose to decide whether any such legislation or other action is necessary, or whether any one, having the proper qualification, has the right to settle on these lands and, tendering to the company the dollar and a quarter per acre, enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an

indefinite period of time. The company, meantime, obtains the title, sells the lands when a good offer is made, and exercises all the other acts of full ownership over them, without the liability to pay taxes.

"We are of opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not; and so far as the opinion in the case of Railway Company v. Prescott asserts a different doctrine, it is overruled." *(Pp. 461, 462.)*

As a matter of interest, it may be noted that Northern Pacific Railroad Company did not open the lands granted by the Joint Resolution to preemption and settlement at the expiration of five years from the completion of the entire road, because those lands remained subject to the mortgages authorized by the Resolution, and it construed the proviso as subjecting to settlement and preemption only lands which did not then remain subject to the mortgage, as appeared to be the plain meaning of the proviso; that the Commissioner of the General Land Office took the position that there was no authority in the officers of the Land Department of the United States to issue regulations providing for the entry under any of the public land laws of lands which had been earned by the Railway Company, or to accept payment for the lands, or to allow entry thereof, and was sustained by the First Assistant Secretary of the Interior in *38 Land Decisions 77;* that the Supreme Court of the United States held that failure to open lands granted by the Resolution to preemption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to the mort-

gage, or not, was a breach of its contract with the United States, and that the Government was entitled, if it could, to prove any damage to it, or advantage to the Company, which resulted from this breach of contract, *(U. S. v. N. P. Ry. Co., 311 U. S. 317, 368),* and that thereafter a compromise settlement was effected, with the approval of the court, under which the Company relinquished its claim to additional lands, and compensation for lands, and consented to judgment against it and in favor of the Government for three hundred thousand dollars, and the Government relinquished its claims against the Company *(U. S. v. N. P. Ry. Co., 41 F. Supp. 273).* Obviously, the failure to open the lands granted by the Resolution to preemption and settlement at two dollars and fifty cents per acre, could not entitle purchasers to relief when it was held to warrant a recovery of damages by the United States.

It is clear from the undisputed record that if the doctrine of contract for benefit of third persons were applicable in this case, appellant who acquired by deed in 1944 following a foreclosure sale, and Stubrud who acquired the surface fee only in 1917 as an assignee of a contract vendee, and MaBelle Cobb who acquired the surface fee only in 1909 as a contract vendee, were not settlers or preemptors and not within the class contemplated by the proviso.

They could not qualify as settlers or preemptors because their acreage exceeded the amount allowed under the "homestead laws". The plain language of the resolu-

tion is that it shall be opened to settlement and preemption "like all other lands". By this language, the Resolution does specify the circumstances under which such lands are subject to settlement and preemption—that is, "like all other lands", or to put it in the only other language it could mean, "in accordance with the requirements of the homestead laws." Since they could not qualify in any event because of the violation of the acreage requirements of the homestead laws, they could not have been within the class of settlers or preemptors referred to in the proviso.

Further in this connection, there was no attempt on their part to come within the class of settlers or preemptors contemplated by the proviso. Never was there any claim or entry filed in the land office. Frequent decisions of the Supreme Court of the United States have held that no preemption or homestead claim attaches to a tract of land until the filing of an entry in the land office.

Thus, in the case of *Railway Co. v. Dunmeyer, 113 U. S. 629, 644, 5 Sup. Ct. 566, 573, 28 L. Ed. 1122,* Mr. Justice Miller, speaking for the court, said:

> "Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that, by such a proceeding, a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

This language was quoted, and the decision reaffirmed, in *Railroad Company v. Whitney, 132 U. S. 357, 33 L. Ed. 363, 10 Sup. Ct. 112; Whitney v. Taylor, 158 U. S. 85, 39 L. Ed. 906, 15 Sup. Ct. 796.* In *Lansdale v. Daniels, 100 U. S. 113, 116, 25 L. Ed. 587,* it was ruled that "such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose." See, also, *Maddox v. Burnham, 156 U. S. 544, 15 Sup. Ct. 448, 39 L. Ed. 527.*

Not only were appellant's predecessors not within the class of settlers and preemptors contemplated by the proviso because they were not qualified, but likewise they did not purport to even try to come within the class.

Furthermore, appellant's argument that the proviso was a mandate to sell to settlers, and that it therefore follows that purchasers were entitled to the benefits of the proviso, flies directly in the face of two decisions of the Supreme Court of the United States.

There is no dispute over the mandatory language of the grant involved in the case of *Oregon and C. R. Co. v. United States, 238 U. S. 393, 35 S. Ct. 908, 59 L. Ed. 1360,* in which the United States had filed a complaint to declare a forfeiture of unsold lands in a railroad grant. The sale proviso in that grant provided:

> " 'That the lands granted by the act aforesaid (act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to

one purchaser, and for a price not exceeding two dollars and fifty cents per acre;' " *(35 S. Ct. at 913)*

From that standpoint, the difference in statute involved, the case is not helpful to appellant. The holding of the court likewise does not help appellant. Cross-complaints were filed by actual settlers involving the following:

> "The cross complainants alleged that they were actual settlers upon the lands granted by the act of May 4, 1870, long prior to the institution of any suit or the assertion of any claim of forfeiture by the government; * * * and both cross complaints and petitioners respectively alleged in substance that the lands were granted in trust to the respective grantee companies for actual settlers or those who should become such, and alleged respectively tender of the purchase price, demand for conveyances and the refusal of the railroad company to accept the tender or make the conveyances. And both cross complainants and interveners asserted a prior right to the extent of the land demanded by them, respectively; denied that the grants had become forfeited, and resisted the relief prayed by the government. They adopted in all other particulars the allegations of the bill, and relied upon them as the basis of their respective claims; prayed that the railroad company be decreed to hold in trust the legal title to the land respectively claimed by them, that their several rights be established and enforced, and that the railroad company be directed to convey to each of them the tract of land applied for by each, and for general relief. * * *
>
> "Demurrers were sustained to the cross complaints and to the petitions in intervention." *(35 S. Ct. at 911)*

With respect to those claims, the Supreme Court of the United States decided:

"The provisos of the act having been thus established as covenants, not conditions subsequent, between the government and the defendants, and their continuing obligation determined, we are brought to the consideration of the rights of the cross complainants and interveners thereunder.

"It may be said that in some of the aspects of our discussion there was implication against their contentions, but it also may be said there is implication for them. Undoubtedly the provisos expressed the policy of the settlement of the lands and a sale to settlers, but the cross complainants and interveners assert a right more definite—a trust, indeed, and personal—of compulsory obligation upon the railroad company, to be enforced in individual suits. * * *

"Nor need we pause to consider the differences between charitable trusts and other trusts, the class, not individual interest, which the former must have, as it is contended, and the certainty in the beneficiaries which the cases have assigned to the latter. And certainly the words 'actual settlers' indicate no particular individuals. They describe a class or body of individuals without habitation or name. As Judge Wolverton, in his opinion in the district court (186 Fed. 861, 910), said: 'There could be no actual settler until an actual habitation was established upon some specific parcel of this land. Logically, no one is a cestui que trust under the theory until and unless he becomes such a settler. This is a palpable demonstration of the uncertainty as to the beneficiary, for who, of the vast concourse of humanity, is going to come and claim the right and privilege of settling upon the land?' We cannot construe the grants as confined or encumbered by rights so indefinite.

"There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the government that the company 'might choose the actual settler; might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60, or 100 acres of any

> amount not exceeding 160 acres.' And we add, it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed and we say 'restrictions imposed' to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure, divested of the obligations of the provisos." *(35 S. Ct. at 923-925).*

In that case actual settlers were refused their right to enforce a sale and purchase under the settlement and sale proviso admittedly applicable to the granted lands involved.

That decision was referred to for comparison by the Court with reference to the Northern Pacific grant in *U. S. v. N. P. (1940), 61 S. Ct. 264, 311 U. S. 317, 85 L. Ed. 210,* referred to above when the court said:

> "We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. *We hold further that the company was not a trustee of the lands* for the United States either in its own right or *in behalf of possible settlers.* It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of lands."
>
> *(61 S. Ct. at 287)*

The Supreme Court in a third case has held that only the United States has a cause of action to question the title conveyed by a patent. The Court said in *Burke v. Southern Pacific, 34 S. Ct. 907, 234 U.S. 669, 58 L. Ed. 1527:*

"In the last case this court said, speaking through Chief Justice Marchall: 'It is not doubted that a patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, *and has always been held conclusive against all those whose rights did not commence previous to its emanation* * * *.'" *(34 S. Ct. 916).*

In this connection that the position taken by appellant is without authority is reflected in his brief:

"See *Krutzfeld v. Stevenson, et al, 86 Mont. 463, 284 Pac. 553,* wherein it was held that where a vendor executed a deed to an interest in oil land and received an adequate consideration therefor, he could not come into a court of equity to evade his obligation on the ground that the deed did not convey what he had agreed to convey, but the court would consider as done that which should have been done, and sustain the transaction. In this case the defendant Railway Company cannot escape its obligation upon the ground that the deed does not convey what it had bound itself to convey by the acceptance of the Joint Resolution of 1870." *(App. Br., Pp. 29)*

It is undisputed that the contract for deed between MaBelle Cobb and defendant railway company executed in 1909 contained an express exception and reservation of all minerals. That contract was recorded June 2, 1917, when assigned by MaBelle Cobb. Millard Stubrud having succeeded to MaBelle Cobb's interest under the contract, the railway company in 1918 conveyed by deed to Millard Stubrud and the deed contained the same express exception and reservation of all minerals. That deed was recorded in 1918. No one contends that the deed to Stubrud did not contain everything it contracted to con-

vey. The case cited is simply not pertinent under the undisputed facts.

Appellant, however, who acquired his rights under a special warranty deed in 1944 following a foreclosure sale, now claims that the defendant should have conveyed in 1918 something that MaBelle Cobb and Stubrud did not contract to buy.

We respectfully submit that under the undisputed facts, and the Supreme Court decisions referred to, the contract was not for the benefit of this appellant, the railway company did not acquire title to the land as a trustee for this appellant, and appellant has no standing legally or equitably to assail the title out of which his rights are carved.

b. *Sale of the Land to Appellee Railway Company, Upon Foreclosure of the Mortgages of the Railroad Company, Was a Disposal of the Lands Within the Meaning of the Joint Resolution, and They Could Not Thereafter Be Subject to the Proviso.*

The Joint Resolution of 1870, plainly contemplates that the requirement that the land thereby granted shall be subject to settlement and preemption at a price to be paid the Company, not exceeding two dollars and fifty cents per acre, shall not apply to or survive a sale of the lands upon the foreclosure of the mortgage thereby authorized, for it expressly provides that in such event "such lands shall be sold at public sale at places within the states and territories in which they shall be situate

after not less than sixty days' previous notice, *in single sections* or subdivisions thereof, *to the highest and best bidder.*" (Emphasis ours.) Sales in single sections to the highest and best bidder are manifestly inconsistent with settlement and preemption of the lands in subdivisions not exceeding one hundred and sixty acres for two dollars and fifty cents per acre. The complaint shows, on its face, (paragraph IV) "that the said Northern Pacific Railroad Company took advantage of the provision of the said Joint Resolution of Congress of May 31, 1870, and mortgaged the lands and selection rights granted by the said Joint Resolution and the said Act of July 2, 1864; that the said Northern Pacific Railroad Company defaulted in the payments to be made upon the bonds secured by said mortgage, and, in a foreclosure action commenced in the United States Circuit Court, District of Montana, on or about the 7th day of August, 1893, the said lands and rights of the Northern Pacific Railroad Company were sold to the defendant Northern Pacific Railway Company * * *." It is plain that thereafter the proviso of the Joint Resolution ceased to have any application.

Heath v. Northern Pacific Railway Company, 38 Land Decisions 77, was an appeal from a decision of the Commissioner of the General Land Office, July 17, 1909, holding "that by reason of regular proceedings had in the courts whereby all the property of the Northern Pacific Railroad Company, including the land grant, was sold to the Northern Pacific Railway Company, the

lands granted to the company are no longer subject to the provision (the proviso of the Joint Resolution of 1870) relied upon by the appellant." The First Assistant Secretary of the Interior affirmed the action of the General Land Office in rejecting Heath's homestead application, upon the ground that the Interior Department was without jurisdiction in the premises, but intimated that the sale under the foreclosure proceedings operated as a disposal of the lands within the meaning of the Joint Resolution, "because under those proceedings all the lands which had been patented to or selected by the company were ordered to be sold in the manner prescribed by the terms of the joint resolution, and evidence has been submitted on behalf of the company showing that the land involved herein was sold in accordance with the decree."

It affirmatively appears upon the face of the complaint, therefore, that at the time of the purchase of the lands here in controversy by appellant's predecessor in title and interest, those lands were not subject to the proviso relied upon by appellant.

c. *The Mortgage Foreclosure Proceedings (App. Br., Pp. 31)*

Appellant now attacks collaterally the validity of the foreclosure sale of 1896.

He not only cites no authority, but his position is directly contrary to the allegations of Paragraph IV of his complaint admitted in Paragraph IV of the Answers *(T, Pp. 5, Comp. Par. IV; T, Pp. 23, Ans. Par. IV; T.*

Pp. 43, Ans. Par. IV). Appellant is bound by these allegations:

> *Weatherman v. Reid, 62 Mont. 522, 205 Pac. 251;*
>
> *Anderson v. Mace, 99 Mont. 427, 45 P. (2d) 771;*
>
> *Bancroft's Code Pleading, Ten Year Supplement, 272, Sec. 520.*

In any event how does this defect, if any, help this appellant? The foreclosure sale was in 1896. Patent issued to this defendant in 1902. We take the position that the issue of the patent confirms the fulfillment of the grant, including the validity of the foreclosure sale, is conclusive evidence of the title of the appellee railway company to the entire fee, and is not vulnerable to collateral attack. Appellant's position depends on the validity of the patent. It is difficult to find any consistency or relevancy in this argument concerning the validity of the foreclosure sale in 1896, when patent issued in 1902, and when appellant depends upon the validity of the patent and the validity of the title of appellee railway company as the primary source of his rights. In what possible way could this defect, if it exists, convey any right in the severed mineral fee in 1944 or 1952 to the appellant?

Furthermore, the Supreme Court of the United States and Congress have flatly disagreed with appellant. In the *Forest Reserve Case, 1920, 41 S. Ct. 439, 256 U. S. 51, 65 L. Ed. 825,* the court said:

> "The lands in question are within the indemnity limits of the land grant made to the Northern Pa-

cific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the joint resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other." *(41 S. Ct. at 439)*

The Act of June 25, 1929, *46 Stat. 41, 43 U.S. C., Sec. 921-929,* and the Land Grant Case that resulted, *U. S. v. N. P., 1940, 61 S. Ct. 264, 311 U. S. 317, 85 L. Ed. 210,* and the subsequent disposal of the case in 41 F. Supp. 273, likewise resolve the issue.

II. *APPELLANT IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE MINERAL RESERVATION.*

Certified copy of the patent issued to appellee railway company is filed as an exhibit in this case. The Supreme Court of the United States has long since decided that it conveys the mineral fee as well as the surface fee.

> *Burke v. Southern Pacific (1914), 34 S. Ct. 907, 234 U. S. 669, 58 L. Ed. 1527*
>
> *United State v. Illinois Central R. Co., 7th C.C., January 18, 1951, 187 F. (2d) 374,* adopting an excellent opinion by the District Court in *89 F. Supp. 17.*

After the United States issued the patent to defendant railway company which included the minerals as well as the surface, MaBelle Cobb contracted to buy the surface only, the contract excepting and reserving to defendant railway company the minerals. Millard Stubrud, as

assignee of MaBelle Cobb, received a deed from defendant expressly excepting and reserving the minerals. Appellant is a successor in interest to Millard Stubrud.

The only source of title upon which Mabelle Cobb, Stubrud, and now appellant claim their title is the original deed from the appellee. They are estopped from questioning the validity of the mineral reservation.

(1) "A grantee, and those claiming under him cannot deny the binding authority of a reservation or exception in the deed * * *." *(19 Am. Jur. 624, Sec. 26).*

(2) "F. Exceptions or Reservations.
Ordinarily a grantee in a deed will be concluded by recitals therein making exceptions or reservations in favor of the grantor or a third person unless he claims the reserved interest under an independent title." *(31 C.J.S. 218, Sec. 38 (f).)*

(3) See also the following:

Wier, et al v. Texas Co., (1950) La., 5th C.C., 180 F. (2d) 465;

Ambarann Corp. v. Old Ben Coal Corp., (1946), Ill., 69 N.E. (2d) 835;

Greene v. White, Texas, (1941), 153 S.W. (2d) 575;

Studebaker v. Beek, Wash., (1915), 145 Pac. 225;

Midkiff v. Colton, 4th C.C., W. Va., (1918) 252 Fed. 420.

(4) Montana recognizes that a grantee who claims title under a deed is estopped by its recitals. He is not estopped to claim under a different source of title which is paramount. Nevertheless, he cannot claim title under

a deed, and at the same time deny the validity of its recitals or reservations.

Hart v. A.C.M. Co., (1924), Mont., 69 Mont. 354, 222 Pac. 419.

It is elementary that plaintiff must succeed on the strength of his own title.

Hinton v. Staunton, (1950), 124 Mont. 534, 228 P. (2d) 461.

Where in this case is there a single fact disclosing any basis for a claim of title to these minerals in plaintiff? It is conceded that MaBelle Cobb contracted to purchase only the surface rights. It is conceded that Stubrud, assignee of MaBelle Cobb, acquired only the surface rights. It is conceded that plaintiff is a successor in interest to Stubrud acquiring, accordingly, only what Stubrud had to convey.

There is no conveyance of the minerals to the appellant by the United States, by defendant railway company, nor by anyone else. Appellant on his own allegations is literally an interloper in the chain of title to the minerals. He discloses no basis whatsoever for any claim to them.

Appellant's rights stem from a deed containing a mineral exception and reservation. He is estopped from denying its validity.

III. *APPELLANT'S PRETENDED FIRST CAUSE OF ACTION IS, IN ANY EVENT, BARRED BY LIMITATIONS.*

As hereinbefore demonstrated, the proviso in the Joint Resolution of May 31, 1870, pleaded in the com-

plaint, is not self-executing, and if purchasers of lands subject thereto could have any rights whatsoever thereunder, such rights were enforceable only by some appropriate proceeding in a court of equity. While plaintiff is not here asserting any equitable title to the minerals, nor is he seeking to have defendant Railway Company declared a trustee of the minerals for him, it may be noted that such an action was long ago barred by *Sec. 93-2613 M.R.C., 1947,* which provides that "an action for relief not hereinbefore provided for must be commenced within five years after the cause of action shall have accrued." *Mantle v. Speculator Mining Company, 27 Mont. 473, 71 Pac. 665; Kimes v. Northern Pacific Railway Company, 49 Mont. 573, 575; 144 Pac. 156.*

Legal title to the minerals in the lands in controversy appears, on the face of the complaint, to be vested of record in defendant Railway Company. *Secs. 93-2504, 2505, and 2507 R.C.M., 1947,* provide as follows:

> 93-2504: *"Seizin within ten years—when necessary in actions for real property—action for dower.* No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within ten years before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within ten years after the death of her husband."

> 93-2505: *"Such seizin, when necessary in action or defense arising out of title to or rents of real property.* No cause of action, or defense to an action, arising out of the title to real property, or to rents

or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within ten years before the commencement of the act in respect to which such action is prosecuted or defense made."

93-2507: "*Possession—when presumed—occupation deemed under legal title, unless adverse.* In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for ten years before the commencement of the action."

As owner of record of the legal title to the minerals in question, defendant Railway Company must be presumed to have been possessed thereof at all times since prior to the conveyance of Section 23 to plaintiff's predecessor in title and interest, and the occupation of the premises by plaintiff and his predecessors must be deemed to have been under and in subordination to the legal title held by defendant Railway Company, there being no allegation that plaintiff has at any time held or possessed the minerals in said Section 23 adversely to defendant's legal title thereto. Since the complaint shows, on its face, that the record title to the minerals is and at all times since 1898 has been in defendant Railway Company, neither plaintiff nor his predecessors in title and interest was

seized or possessed of the minerals in question within ten years before the commencement of this action, or within ten years before the making by defendant Railway Company of the oil and gas lease to defendant Texas Company, or the entry of the Texas Company upon the premises thereunder, and the pretended first cause of action set forth in his complaint is barred by limitations.

IV. *APPELLANT'S CLAIM IS BARRED BY LACHES.*

Since recording the deed from appellee to Stubrud in 1918, appellant and his predecessors in interest have stood idly by until there was a tremendous increase in value of the mineral fee. During all that time appellee was assessed and paid the taxes on its right of entry. Appellee entered into contractual obligations. Appellant is barred by laches.

Lewis v. Bowman, 113 Mont. at 80, 121 P. (2d) 162;

O'Hanlon et al v. Ruby Gulch Mining Co., 64 Mont. 318, 209 P. 1062;

Riley v. Blacker, 51 Mont. 364, 152 P. 758;

Montgomery v. Bank of Dillon, 114 Mont. at 408, 136 P. (2d) 760;

Hynes v. Silver Prince Min. Co., 86 Mont. 10, 281 P. 548;

Johnson v. Opheim, 67 Mont. 126, 214 P. 951;

Harrington v. Butte & Superior Co., 52 Mont. 263, 157 P. 181;

Kavanaugh v. Flavin, 35 Mont. 133, 88 P. 764;

Morrison v. Jones, 31 Mont. 154, 77 P. 507.

CONCLUSION

We respectfully submit that the facts are all developed and undisputed; that the legislative history of the Joint Resolution of 1870, the decisions of the federal land department, and the decisions of the United States Supreme Court, clearly indicate that the settlement and preemption proviso of the Joint Resolution of 1870 applied only to "place lands" between Portland and Puget Sound, and did not affect any lands in Montana, whether "place lands" or "indemnity lands." The summary judgment must be affirmed.

Respectfully submitted,

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